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IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1970

Misc. No. ~~1767~~ 70-224

E. H. HOLCOMB, JR., Petitioner

vs.

CESSNA AIRCRAFT COMPANY, and
CONTINENTAL MOTORS CORPORATION,

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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The Petitioner, by and through his undersigned attorneys, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on March 2, 1971.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appen-

dix hereto. No opinion was rendered by the District Court for the Middle Distrixt of Florida.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on March 2, 1971. This Petition for Writ of Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 USC §1254(1).

QUESTIONS PRESENTED

1. Whether the decision and opinion of the United States' Court of Appeals for the Fifth Circuit in this cause is in conflict with the decisions from other Circuit Courts of Appeal and decisions from this Court?

2. Whether the Court of Appeals for the Fifth Circuit properly apply the "scintilla of evidence" rule in reversing the judgment and jury verdict with directions to the lower Court to dismiss the Complaint with prejudice to the plaintiff?

STATUTORY PROVISIONS INVOLVED

Amendment VII Constitution of the United States; Federal Rules of Civil Procedure 38 (a).

STATEMENT OF THE CASE

In this petition, Petitioner will be referred to as Holcomb and Respondent, Cessna Aircraft Co. will be referred to as Cessna and Respondent Continental Motors Corporation, will be referred to as Continental. For purposes of brevity, the following abbreviations will be used:

"R" - Record on Appeal

"O" - Opinion of the United States Court of Appeals for the Fifth Circuit

On December 14, 1967, Holcomb filed a Complaint in the United States District Court for the Middle District of Florida, Tampa Division, against Cessna and Continental. The theory of the Complaint was that Cessna had sold Holcomb a Cessna 310 K airplane equipped with Continental engines and that the engines were defective and there were other defects associated with the airplane. Cessna and Continental were sued upon the doctrines of implied warranty and expressed warranty. After Motions and other pleadings, an Amended Complaint was filed upon the same theories and Continental and Cessna filed their Answers. A jury trial was ultimately held during the week of December 15, 1969, resulting in a judgment for Holcomb against Continental in the sum of

$2,233.70 for engines and $25,928.58 for expenses. Judgment was entered for Holcomb against Cessna in the amount of $32,077.47 for expenses. Subsequently, by agreement of Holcomb, the Judgment on the verdict was amended to allow recovery against Cessna individually for $6,148.89 and against Cessna and Continental, jointly and severally, for $25,928.58.

The testimony and evidence educed at the trial is outlined in the opinion of the Court of Appeals for the Fifth Circuit which is attached hereto. As can be seen from that detailed statement of the facts, the evidence was without contradiction that something was wrong with the engines at the time they were checked after only 182 hours of use since at that time, the compression in all cylinders was found to be low. The issue submitted to the jury was whether the defect in the engine was caused by pilot error as Continental's and Cessna's evidence tended to show, or as a result of some manufacturing defect as Holcomb's evidence tended to show. Cessna's and Continental's evidence indicated that the defect developed as a result of over-heating the engines caused by leaning the fuel improperly or by failure to maintain proper flight altitude. This evidence was based upon the opinions of certain experts and mechanics employed by Cessna and Continental. These experts admitted that the problem in the

engines could be caused by only one of two things: either a defect in the design or manufacture of the engines, or in pilot error as described above. Holcomb and his pilot, Mr. James Mathews, testified unequivocably that they did not operate the plane at an incorrect altitude or that they improperly leaned the fuel. Moreover, Mr. Mathews testified that, in his opinion, the defect "would revert back to the manufacturer". (0.13) In addition, Mr. Holcomb testified that he had talked with a Cessna representative who admitted that the company had experienced problems that they had not been able to correct in these Continental engines (R-253). Moreover, there was testimony that the same engines as those in the 310 K were having overheating problems and that numerous engines had been burned up in airplanes owned by the military at Ft. Rucker, Alabama. Of course, Continental's representative explained this by testifying that the military people improperly subjected these engines to stresses for which they were not designed. Therefore, not only did James Mathews testify that the defect "would revert back to the manufacturer", but the circumstantial evidence overwhelmingly demonstrated that the defect did not develop as a result of pilot error and on the basis of Cessna's and Continental's own experts' testimony, would therefore of necessity have been caused by improper design or manufacture by Continental.

The Court of Appeals for the Fifth Circuit classified the above evidence by Holcomb as being either "a mere scintilla" or something less. (0.16) As a result of this evaluation of the evidence, the Fifth Circuit reversed the judgment and directed the District Court to dismiss Holcomb's Complaint against Continental and further to permit him to claim only a few minor items of damage against Cessna which were unconnected with the engines. In doing so, the Fifth Circuit not only had to conclude that the circumstantial evidence amounted only to a mere scintilla or less, but that the direct testimony of Mr. Holcomb as to his conversation with the Cessna representative concerning the problems which they had with the Continental engines and the direct testimony of the pilot, James Mathews, that the defect reverted back to the manufacturer, had to be disregarded.

REASONS FOR GRANTING THE WRIT

The decision below conflicts with the decisions of this Court and other Circuit Courts of Appeal.

1. As to an appellate court's authority to weigh conflicting evidence and to determine the credibility of the witnesses' testimony.

The Fifth Circuit Court of Appeals in its opinion has determined the weight

and credibility to be given to the testimony of Pilot Matthews, as evidenced by their construction of the meaning of his testimony that the extra tolerance in the engine was due to wear.

This was viewed by the appellate court examining the cold record as an "ultimate concession" of the witness, although the same testimony was equally susceptible when taken in perspective of the other testimony given at trial, that the defect was in fact the abnormal degeneration of the component parts with normal use, or in effect that the defect was, in fact, the lack of normal durability of the metal components of the engine.

In Standard Oil Co. of California vs. Perkins, 347 F. 2d 379 (9th Cir., 1965), that Circuit Court of Appeals enunciated the principle that it is an undue invasion of the jury's historic function for an appellate court to weigh conflicting evidence, judge credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury. Cf., Lavender vs. Kurn, 327 U.S. 645 (1946). It is the position of the Petitioner that the Fifth Circuit Court of Appeals demonstrates that the Court has, in fact, sat in the position of the jury and, after viewing the cold record, determined the weight and credibility and the meaning to be given to the testimony of Pilot Matthews and, in so doing, has exceeded its authority. This posture is also contrary to Continental Airlines, Inc. vs. Wagner-Morehouse, Inc., 401 F. 2d 23 (7th Cir., 1968), in which that Court

reiterated the longstanding Federal doctrine that neither the trial court nor an appellate court may substitute its judgment for that of a jury on disputed issues of fact.

2. As to the duty of an appellate court in determining the propriety of a directed verdict to afford the non-moving party all reasonable inferences deducible from the evidence.

The opinion of the Fifth Circuit Court of Appeals is in conflict with the longstanding Federal precept that a motion for directed verdict should be examined with all inferences to be reasonably drawn from the evidence construed in a light most favorable to the opposing party, and when such is done and reasonable men in fair and impartial exercise of judgment might reach different conclusions, a directed verdict is improper, as enunciated in Continental Airlines, Inc. vs. Wagner-Morehouse, Inc., supra. The Fifth Circuit Court of Appeals has taken as a basis of its opinion the testimony of Pilot Matthews and placed it out of context with the rest of the testimony and evidence adduced at trial and failed to allow a construction favorable to the plaintiff in finding that insufficient evidence existed for the decision of the jury.

Although both Holcomb and Pilot Matthews testified that the cylinders of the motor were not overheated and Matthews stated there was a defect in the motor,

though he did not know the source, the Court placed a strained construction on this and determined the weight to be given to this evidence and the credibility of these witnesses. This position is contrary to the decision of this Court in Lavender vs. Kurn, supra., wherein the Court stated that an appellate court's function is exhausted when the evidentiary basis for the verdict becomes apparent, and that it is immaterial that the Court might draw contrary inference or feel that another conclusion is more reasonable. See also, Smith vs. J. C. Penney Company, 261 F. 2d 218 (7th Cir., 1958).

3. As to the authority of the appellate court to pick and choose among evidence in arriving at a determination of whether or not an evidentiary basis for the jury verdict sufficiently met the requirement of being more than a mere scintilla of evidence.

In reaching its decision, the Fifth Circuit had to exclude the testimony of Mr. Holcomb as to his conversation with the Cessna representative concerning the problem they had with Continental Engines and the impact of the testimony of Continental's own witnesses as to the problems they had had with these engines at Fort Rucker. In addition to mis-evaluating the circumstantial evidence in support of the plaintiff's case, the opinion of the Circuit Court of Appeals demonstrates that it determined the credibility of Pilot Matthews' direct testimony as to the existence of a defect within the motor. This position

is in direct conflict with the proposition that the focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury and the very essence of its function is to select from among conflicting inferences and conclusions that which is considered most reasonable, but the courts are not free to re-weigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable. Such was the position taken in Standard Oil Co. of California vs. Perkins, supra. Cf., Sentilles vs. Inter-Caribbean Corporation, 161 U.S. 107 (1959); Tennant vs. Peoria & P. U. Ry. Co., 321 U.S. 29 (1944).

Upon a reading of the record and of the opinion of the Fifth Circuit Court of Appeals, wherein it states that the Court is "inescapably driven to the unavoidable conclusion that as to the engines, the evidence for the plaintiff simply failed to raise an issue for submission to the jury on the question of implied warranty," (O 15-16) and that the jury's verdict could not rest on mere guess or speculation (O 12), it is apparent that the appellate court has exceeded its authority as enunciated in Lavender vs. Kurn, supra. at 654, wherein this Court stated, "Whenever facts are in dispute or evidence is such that fair-minded men might draw different inferences, a measure of speculation and conjecture is required on those whose duty it is to settle disputes,

by choosing what seems to them to be the most reasonable inferences. Only where there is a complete absence of probative facts to support the conclusion reached does a reversable error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion." The opinion of the Fifth Circuit Court of Appeals also demonstrates the Court's position is in conflict with a second principle enunciated in the Lavender decision, to the effect that an appellate court's function is exhausted when the evidentiary basis for the jury's verdict becomes apparent, and it is immaterial that the Court might draw contrary inferences or feel that another conclusion is more reasonable.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Fifth Circuit Court of Appeals.

Respectfully submitted,

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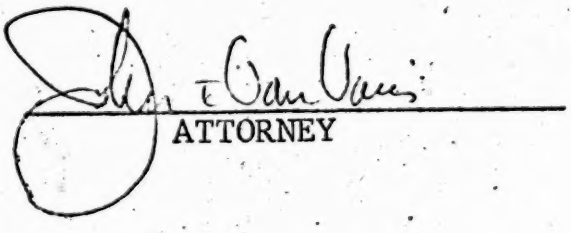
& EVANS, Professional Association
Post Office Box 3324
Tampa, Florida 33601
Attorneys for Petitioner,
E. H. HOLCOMB, JR.

By: _____
JOHN I. VAN VORIS

CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth District have been furnished to Richard M. Mitzel, Esquire, of Fowler, White, Gillen, Humkey, Kinney & Boggs, P. A., Post Office Box 1438, Tampa, Florida, 33601, attorneys for CESSNA; and to John T. Allen, Esquire, of Harrison, Greene, Mann, Davenport, Rowe & Stanton, Post Office Drawer D, St. Petersburg, Florida, 33701, attorneys for CONTINENTAL MOTORS CORPORATION; by first-class, prepaid U. S. Mail this 28th day of May, 1971.



ATTORNEY